



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

OSWER 9375.6-11A

MEMORANDUM

SUBJECT: Modifications to the State Deferral Program in Response to Office
of the Inspector General Report No. EISFF8-11-0020-8100234
State Deferrals: Some Progress, but Concerns for Long-Term
Protectiveness Remain

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TO: Superfund National Policy Managers, Regions 1 - 10

Purpose

The purpose of this memorandum is to inform you of modifications to the Office of Emergency and Remedial Response's (OERR's) State Deferral Program in direct response to the subject Office of the Inspector General (OIG) audit report and the suggestions contained therein. Under the State Deferral program, EPA may defer consideration of certain sites for listing on the National Priorities List (NPL) while interested States or Tribes compel and oversee response actions.

Work is underway to implement Public Law 107-118, the Small Business Liability Relief and Brownfields Revitalization Act, which includes deferral provisions for eligible sites under that Act. The implementation of the Brownfields Act may or may not affect the recommendations contained in the present memorandum.

Background

In June 1993, EPA initiated its formal State Deferral program. Under this program, States enter into agreements with EPA to oversee cleanup of sites that are deferred from NPL listing. The OIG conducted an audit of the State Deferral program and its final report, dated September 10, 1998, included recommendations that EPA:



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- require regional officials to track deferrals more closely,
- implement performance measures that will reflect the desired outcome of the State Deferral program,
- establish a mechanism to ensure that community concerns about deferrals are brought to EPA's attention, and
- establish a mechanism to ensure that five-year reviews or an equivalent process will be performed where hazardous contaminants will remain on sites.

OIG Recommendation Regarding Tracking Deferred Sites and Implementing Performance Measures

The OIG report recommended that the Office of Solid Waste and Emergency Response (OSWER) improve the management of the State Deferral Program by:

- reviewing the Superfund Program Implementation Manual (SPIM) to ensure that tracking elements are sufficient to cover differences in state program terminology,
- establishing a mechanism to require regional officials to more closely track the deferrals so that sites can be archived from the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) upon completion of the deferral, and
- implementing performance measures that will reflect the desired outcomes of the deferral program.

Response to OIG Recommendation Concerning Tracking Deferred Sites and Implementing Performance Measures

In response to the OIG's recommendations, OSWER has improved the Agency's ability to track starts and completions at deferred sites. OSWER has updated the SPIM to ensure that tracking elements are sufficient to cover differences in State program terminology. This ensures that Regional managers have the ability to track the steps involved in the remedial processes reported by the States. State Deferral sites are now also included as a program measure (e.g., activities used to show progress made in achieving program priorities).

OSWER has developed a key indicator of the status of Non-NPL sites in CERCLIS, including a value specifically for State Deferrals. State Deferral sites have been added to the Summary Site Inventory Report as a means to indicate by Region the numbers of ongoing and completed State Deferrals. State Deferrals have also been incorporated into the OSWER Government Performance and Results Act (GPRA) measure for final site assessment decisions under the Superfund Program. This allows OSWER to track the percentage of sites that have final assessment decisions. Improved tracking also provides up-to-date information on the progress of cleanup at deferred sites. All of these measures provide a mechanism to better track the progress at the sites deferred to States under the State Deferral program. In addition, the Agency now prepares reports on the successes of the program more efficiently.

OIG Recommendation Regarding Community Involvement at Deferred Sites

The OIG report also recommended that OSWER establish a mechanism to ensure that community concerns about deferrals are brought to EPA's attention. The Guidance on Deferral of NPL Listing Determinations while States Oversee Response Actions (9375.6-11; EPA/540/F-95/002; PB95-963223) states that the Region should be confident that the principles of public involvement embodied in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) are maintained at deferred sites. The States should ensure that the impact of its efforts to involve the public, especially during the remedy selection and response action completion phases, will be substantially similar to the intended effect of implementing the procedures required by the NCP. The guidance also states that the State should assure that the affected community at a site does not have significant, valid objections to deferring the site to the State. It states that the State should document all of its interactions with the community and inform the Region of possible opposition to the deferral.

While State adherence to the specific procedures of the NCP is not required for the deferral program, a State community relations program should embrace similar principles and be able to demonstrate its ability to implement such principles at deferred sites. While the guidance offers some provisions to ensure that communities at deferred sites are adequately involved, it does not prescribe a particular means that a State must use to achieve that end. Rather, the State will generally have the discretion and the responsibility to determine the most appropriate means to identify, notify, and continue to involve communities affected at deferred sites.

Response to OIG Recommendations Concerning Community Involvement

Regions should follow the State Deferral program guidance regarding community involvement at deferred sites. In order to ensure that a community can raise its concerns to EPA about a deferral, the EPA Region should provide an EPA contact name and telephone number to the affected community. Options to achieve this include, but are not limited to, the following:

- hold a public meeting when the Region is considering deferring a site,
- publish an announcement with EPA contact name and telephone number when the site is deferred,
- post information on sites deferred to States on the Internet with the name and telephone number of an EPA contact, and
- require that the State file an annual report on cleanup progress at the site that would include a summary of the State's interaction with the community throughout the year.

OIG Recommendation Concerning Protectiveness of Remedies

The OIG report also included a recommendation concerning the periodic review of the protectiveness of remedies at deferred sites, suggesting that the Agency establish a mechanism to ensure that five-year reviews or an equivalent process be performed where hazardous contaminants remain on site.

Response to OIG Recommendations on Protectiveness of Remedies

In order to ensure long-term protectiveness of remedies at deferred sites, the Regions are encouraged to:

- follow the guidance, which states that the quality of the response actions should be substantially similar to a response required under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and that, generally, the State should consider giving preference to solutions that will be reliable over the long term;
- include a requirement for a five-year review or the equivalent in any new State Deferral agreements signed. The agreements should include a requirement that the State provide an annual status report for sites where waste remains on site. For such sites that have reached the construction completion phase, the report should include:
 1. Description of waste remaining
 2. Description and schedule for post-construction maintenance
 3. Description and schedule for monitoring

Conclusion

In response to recommendations made by the OIG in its Audit Report E1SFF8-11-0020-8100234, the Agency has implemented improvements to the State Deferral program that will:

- improve EPA's ability to track progress of investigations and cleanup at deferred sites,
- measure progress under GPRA,
- provide communities at deferred sites with a means to contact EPA, and
- encourage five-year reviews or the equivalent at sites where hazardous substances remain on site.

The State Deferral guidance is intended to be flexible to account for differing capabilities of participating States and Tribes. The Regions may choose to act at variance from certain provisions of the guidance to accommodate a wide range of oversight and reporting conditions.

Work is underway to frame how deferral of sites will occur under Public Law 107-118, the Small Business Liability Relief and Brownfields Revitalization Act. The implementation of the Brownfields Act may or may not affect the recommendations contained in the present memorandum. If you have any questions regarding the response to the OIG audit, please contact Marti Otto of my staff at (703) 603-8853.

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